Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

EDWARD PRIMO *and*
DELORES PRIMO, *h/w*,
Petitioners

v.

COLANERO CONTRACTING COMPANY,
COLANERO EQUIPMENT COMPANY *and*
CSX TRANSPORTATION, INC.
Respondents

On Petition for a Writ of Certiorari to the Pennsylvania Superior Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a state mandates a right of appellate review from judgments in civil actions, do the Due Process and the Equal Protection Clauses require that all appropriately filed and perfected appeals receive equal consideration on the merits?

2. Does the Due Process Clause require a state court trial judge to assign specific reasons for the entry of a directed verdict against a plaintiff where state law guarantees a right to trial by jury?

3. Were the Petitioners denied due process where none of the State Courts indicated any basis for the entry of a directed verdict in favor of the Respondent, CSX Transportation Co., Inc.?

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs and Appellants below):

The Petitioners are Edward Primo and his wife, Delores Primo.

Represented by:

Frank D. Branella, Esquire
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Philadelphia, PA 19102

Respondents (Defendants and Appellees below):

The Respondents are Colanero Contracting Company, Colanero Equipment Company and CSX Transportation, Inc.

Represented by:

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PRELIMINARY STATEMENT

Petitioners respectfully request that Your Honorable Court issue a Writ of Certiorari to the Pennsylvania Superior Court in order to determine the constitutional significance of the refusal of state appellate courts to review a directed verdict in favor of one defendant and a judgment notwithstanding a unanimous jury verdict entered by the Trial Court in favor of another defendant.

OPINIONS BELOW

The memorandum opinion of the Pennsylvania Superior Court is not reported. A complete copy of the opinion is contained in the Appendix at A15 - A19. The opinion of the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania, is not reported. A complete copy of that opinion is contained in the Appendix at A1-A14.

JURISDICTION

Petitioners respectfully request that Your Honorable Court review the decision of the Pennsylvania Superior Court pursuant to the Court's jurisdiction conferred by 28 U.S.C. § 1257 (a) in that the Petitioners are seeking review of a state court decision concerning rights, immunities or privileges arising under the Constitution of the United States.

A unanimous jury verdict in the amount of Seven Hundred Thousand ($700,000.00) Dollars was returned in favor of the Petitioners as a result of the injuries sustained by the Petitioner, Edward Primo. The Trial Court entered a judgement notwithstanding the verdict in favor of the Respondents, Colanero Contracting Company and its affiliate, Colanero Equipment Company (collectively designated "Colanero" herein). Prior thereto, the Trial Court granted a Motion for a

Directed Verdict in favor of the Respondent, CSX Transportation, Inc. and against the Petitioners. The Petitioners filed a timely appeal to the Pennsylvania Superior Court and the Trial Court's decision was affirmed on March 21, 2000 by way of an unpublished memorandum decision having no precedential value.[1] Reconsideration was sought, and an Order denying rehearing was entered on May 31, 2000.

A timely Petition for Allowance of Appeal was filed in the Pennsylvania Supreme Court and an Order denying discretionary review was entered by that Court on March 13, 2001. The Pennsylvania Supreme Court thereafter denied the Petitioners' request for reconsideration on April 25, 2001. The instant petition is being filed with 90 days from the denial of reconsideration by the Pennsylvania Supreme Court.

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[1]As an unpublished memorandum decision, the Court's opinion is not generally available to the public and it has absolutely no precedential value. *See*, e.g., *In re Estate of Glover,*447 Pa.Super. 509, 669 A.2d 1011 (1996) (memorandum decisions are not to be accorded precedential weight.); *Com. v. Karn,* 168 Pa.Cmmwlth. 435, 650 A.2d 1176 (1994) (same); *U.S. v. Turley,*891 F.2d 57 (3rd Cir. 1989) (same); 65 Pa.Code. § 65.37 ("unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action . . .").

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides:

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a complex premises liability case involving an April 24, 1995 severe crush injury to the left shoulder of the Petitioner, Edward Primo, which occurred when a trailer adjacent to the trailer on which he was working toppled over due to the placement of the trailers on unstable topsoil consisting of construction debris.

The site of the incident is located on a parcel of real

estate which is adjacent to Kingsessing Avenue between 68th and 69th Streets, Philadelphia, PA which was apparently leased from CSX Transportation, Inc. ("CSX" herein) by a third party having a long affiliation with Colanero. The parcel also abuts the property owned by Colanero. The accident was caused by the instability of the ground soil at the site of the accident, which in turn, rendered it incapable of supporting the weight of the trailers, and the dangerous condition was caused by the frequent use of the premises by Colanero in storing large construction equipment, trucks and trailers on it and in using the property as a dump site for construction debris for as long as thirteen years, all of which was known by CSX.

At trial, the Petitioner, Edward Primo, testified that at the time of the accident, he had been working for Giulietta Construction Company for approximately three weeks as a "low-boy" truck driver (N.T. p. 61-2). On the day of the accident, he was instructed by his supervisor, James Dadario, Jr., to go to the site in order to transport an empty trailer to Giulietta' New Jersey construction yard (N.T. p. 68, 161.) Mr. Primo was accompanied to the site by John English, James Dadario, Jr. and an individual known only as "J.B." (N.T. p. 68).

Mr. Primo arrived at the area between 8:00 a.m. and 8:30 a.m., and was initially instructed to help collect nuts, bolts and equipment (N.T. p. 69). Mr. Dadario, Jr. then instructed Mr. Primo to raise the landing gear on the empty trailer which was located approximately five feet away from another trailer (N.T. p. 76).

As Mr. Primo began to raise the landing gear so that the tractor could be attached, the adjacent trailer suddenly pivoted on its axis and toppled into Mr. Primo causing him to become

pinned between both trailers (N.T. p. 83). James Dadario, Jr. immediately retrieved the "low-boy" tractor and rammed it into the fallen trailer in order to free Mr. Primo (N.T. p. 84).

Prior to the accident, Mr. Primo had the occasion to visit the site of the accident once while working for another company. At that time, Mr. Primo was delivering a dumpster to the general vicinity of the accident because the contractors located nearby were "cleaning some pieces in the yards." (N.T. p. 62). While waiting at the site, Mr. Primo actually observed Colanero dump-truck operators dumping construction fill and debris from the beds of their trucks over the land encompassing the site of the accident (N.T. p. 62). The drivers raised the beds of their dump-trucks, and repeatedly slammed the tailgates by accelerating and rapidly stopping to loosen the dirt and debris trapped by the "dog house" (N.T. p. 63 - 4).[2] Of critical importance in that aspect, Colanero admitted that it "did store dirt on the premises that is the location of plaintiff's alleged accident, for approximately two weeks." (R. 49a).

At trial, Mr. Primo further testified that he initially lost consciousness following the crush injury, and that he remembered co-worker John English holding and rocking him as he regained his senses (N.T. p. 87). He stated that he felt like he "died and came back. There was blood everywhere." (N.T. p. 87). Blood was streaming down his face and hair (N.T. p. 87). "I was bleeding from my hair follicles, and my eyes and my skin." (N.T. p. 87). Mr. Primo was subsequently transported to the emergency room at the Hospital of the

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[2]The "dog house" refers to the structure in the bed of the dump-truck which encloses the hydraulic equipment used to raise and lower the bed.

University of Pennsylvania, where he remained for approximately one week during which he was placed on a morphine drip and muscle relaxants (N.T. pp 88 - 90).

After his release from the hospital, Mr. Primo was taken home by his 78 year old mother and his younger sister (N.T. p. 92). He continued under the care of his treating physician, Dr. Esterhai, and continues to see him on a routine basis, which is now more than six years after the accident (N.T. p. 92).

Dr. Daniel J. Parenti, a board certified physician specializing in internal medicine, testified on behalf of the Petitioners (N.T. p. 768). Mr. Primo was examined by Dr. Parenti on August 15, 1997 at which time Mr. Primo complained of chronic shortness of breath ever since the accident (N.T. p. 770 - 1). Dr. Parenti explained to the jurors that Mr. Primo sustained a "crushing injury from shoulder to shoulder. He sustained multiple rib fractures." (N.T. p. 772). "What he was left with when everything settled down, he has an obvious indentation or deformity in the upper chest . . . and it's very painful to the touch." (N.T. p. 773). The condition is permanent, and it has resulted in significant limitation (N.T. p. 777).

On the issue of causation, the Petitioners presented the expert soil compression testimony of Samuel J. Sero, P.E., who testified that the cause of the injuries sustained by Mr. Primo was the inability of the loose topsoil, which was composed of "dirty fill," to sustain the weight load of the trailers parked thereon. Mr. Sero examined the site of the accident on March 19, 1997, and it was immediately obvious to him that the condition of the site had recently been altered by scraping the loose topsoil into discrete mounds (N.T. p. 251). All that remained of the original topsoil layer were several piles of

"dirty fill" and it was obvious that the topsoil had been removed (N.T. p. 254). At the inspection, Mr. Sero initially observed a "combination front-loader backhoe sitting off to the side. The tracks from this device were seen very clearly on the ground and dust it left behind. So were the scrape marks from the dirt that had been removed . . . " (N.T. p. 251).[3] Nevertheless, Mr. Sero took samples of the soil from one of the mounds and performed compression testing on the sample (N.T. p. 255). He opined that the soil was "very bad soil, loose and not capable of sustaining much loading whatsoever." Accordingly, Mr. Sero testified that:

> "Mr. Primo's injury is due to the fact that the soil where the trailer was placed, especially a loaded trailer is placed, was bad soil conditions. It was a dirty fill topsoil material that settled in and dropped the trailer. The fact that there is also some slight slope in this land just helped gravity to take effect after that. Once it settled down and stated to go, [the trailer] fell over on

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[3]The Petitioners argued to the Trial Court that the recent modification of the scene of the accident was admissible proof of the liability of Colanero under a spoliation theory. Colanero induced James Dadario, Jr., an occasional Colanero subcontractor, to alter the surface immediately prior to the inspection. John English, a former co-employee of Mr. Primo who still works for Dadario, testified that he was once employed by Colanero (N.T. p. 1016), and that he has maintained a relationship to Colanero for ten to fifteen years (N.T. p. 1016 - 18). With a likely wink, Mr. English was informed of the site inspection by a Colanero employee, Howard Carty: "I told him it wouldn't look very good to go out and move the pile of trash that they had out there, no." (N.T. p. 726 - 7). Nevertheless, that was exactly what Mr. English did. He was the operator of the backhoe observed by Petitioners' expert which was depicted in trial exhibits. (N.T. p. 1025).

the trailer next to it.

(N.T. p. 256).

On cross-examination, Mr. Sero testified that the trailer would not have toppled if it had been placed on stable ground, and that there was no mechanical reason for the trailer to have toppled (N.T. p. 288, R. 9a). When asked if it would have made any difference if tire chocks had been employed to arrest movement of the trailer, Mr. Sero noted that the use of chocks would be immaterial since chocks would only stop lateral movement; they are unable to prevent a trailer from overturning sideways along its central axis (N.T. p. 289).

Mr. Steven Colanero, one of the chief officers of the Colanero companies, also testified at trial. He admitted that Colanero employees park heavy construction equipment on the land (N.T. p. 442, 451). At times, Colanero employees have moved dirt and debris around on the land (N.T. p. 445,). Debris left by others on Kingsessing Avenue would be pushed onto the vacant lot where Mr. Primo was injured by Colanero employees so that access to the Colanero facility would not be impeded (N.T. p. 496).

Importantly, when questioned on cross-examination concerning whether Colanero employees dumped the debris depicted in the mounds observed by the Petitioners' soil compression expert, Mr. Colanero candidly admitted that "it was done without my knowledge." (N.T. p. 447). Mr. Colanero likewise admitted that Colanero may have used the area of the accident for as long as thirteen years (N.T. p. 448).

Mr. Colanero also testified that the mounds of debris represented in various photographic exhibits introduced by the

Petitioners is construction rubble. He admitted the possibility that Colanero employees could have place the rubble on the site (N.T. p. 492), and that the debris could have been removed from Colanero construction sites (N.T. p. 495).[4]

With regard to CSX, the evidence at trial established that CSX railroad examiners routinely traveled over the site of Mr. Primo's accident and parked on the premises to examine its nearby railroad tracks. In that regard, long time Colanero employee Howard M. Carty testified that CSX vehicles parked on the premises on a yearly basis from at least 1981 until the time of the accident (N.T. p. 701). The CSX drivers would have had to drive over the precise location of the accident, and at times, the premises was littered with debris (N.T. p. 715 - 6). Accordingly, the Petitioners argued to the Trial Court that CSX voluntarily chose to turn a blind eye to the defective and dangerous condition of its realty.

After the close of evidence, all of the Defendants

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[4]Messrs. Cavacini and Carty, both of whom are employed by Colanero, also testified at trial. In substance, Mr. Cavacini, a 30 year employee, testified that the 21 dump trucks owned by Colanero return to the Colanero facility located across from the site of the accident nightly (N.T. p. 819 - 20, R. 26a - 27a). The construction debris pictured on R. 35a is similar in type and grade to the construction debris which Colanero removes from its construction sites (N.T. p. 824, R. 28a). Finally, Mr. Cavacini admitted that Colanero dump trucks return to the Colanero facility loaded with construction fill on occasions (N.T. p. 698). Mr. Carty testified that Colanero owns a variety of heavy construction vehicles which could dig ruts into the soil (N.T. p. 688). Importantly, Colanero uses the CSX property on an "as needed" basis for temporary storage and parking of the heavy equipment (N.T. p. 695, R. 19a).

requested the entry of a directed verdict against the Plaintiff. The motions were granted as to CSX Transportation Co. ("CSX" herein) and the City of Philadelphia, but denied with regard to Defendants, Colanero Construction Company and Colanero Equipment Company (collectively designated as "Colanero" herein).

Following the verdict, Colanero filed a timely post-trial motion requesting judgment notwithstanding the verdict, or in the alternative, a new trial. Due to the directed verdict in favor of CSX, the Plaintiffs also sought post-trial relief. The Trial Court entertained oral argument, and thereafter entered an Order entering judgment notwithstanding the verdict in favor of Colanero,[5] and denying all other requests for post-trial relief including Colanero's request for a new trial and the Plaintiff's Motion for a New Trial with respect to CSX. In essence, the Trial Court determined that the Petitioners failed to prove that the condition of the soil caused the injuries sustained by Mr. Primo, and that in any event, failed to prove that Colanero was responsible therefor. With regard to the directed verdict entered in favor of CSX, the Trial Court simply refused to set forth any reasons for the Trial Court's actions and termed the

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[5]In view of the constant, thirteen year long use of the CSX property by Colanero and its destruction of the topsoil, the Jury had ample evidence of Colanero's liability. The Trial Court, however, determined that causation was lacking because there was no proof that the soil examined by Mr. Sero was the precise soil located on the premises at the time of the accident.

matter "frivolous."[6]

Upon entry of the adverse judgment, the Plaintiff filed a timely appeal to the Pennsylvania Superior Court. On March 21, 2000, the Court entered a judgment affirming the Court of Common Pleas. In doing so, however, the Superior Court did not engage in any form of reasoned analysis of the case; it merely recited an incomplete version of the evidence and affirmed the Trial Court's decision based on the "adequate" opinion of the Trial Judge. Because of the apparent lack of actual appellate review by the Superior Court, the Petitioners filed a Petition for Reargument expressly noting the Petitioners' contention that the failure of the Superior Court to engage in a reasoned analysis resulted in a due process violation. The Court, however, entered an Order on May 31, 2000 denying the Plaintiffs' April 4, 2000 Petition for Reargument.

The Petitioners thereafter filed a timely Petition for Allowance of Appeal in the Pennsylvania Supreme Court again contending that the Petitioners have been denied due process. That petition was denied and the Supreme Court denied the subsequent Petition for Reargument on April 25, 2001.

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[6]The Petitioners and CSX filed extensive briefs in the Trial Court concerning a host of issues including the duty to discover a dangerous condition and to disclose it to Mr. Primo. None of those issues were addressed by the Trial Court during an in-chambers hearing on the CSX Motion for a Directed Verdict, the hearing on the Petitioners' Post-Verdict Motion or in the Trial Court's opinion. Likewise, the Pennsylvania Superior Court refused to discuss the issues, and the Pennsylvania Supreme Court refused to review the matter. The Petitioners still have not the slightest idea of the Trial Court's reasons for the directed verdict.

REASONS FOR GRANTING THE PETITION

A. CLARIFICATION OF THE DUE PROCESS RIGHTS OF LITIGANTS TO MEANINGFUL APPELLATE REVIEW IS NECESSARY

Initially, the Petitioners recognize that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion). However, the power to eliminate appeals does not carry with it the power to maintain a procedurally deficient appellate process. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 400-05 (1985) (although due process does not require that a state provide any appeal, it does require that a defendant receive effective assistance of counsel on the first appeal as of right, if such an appeal is provided); *Mayer v. Chicago*, 404 U.S. 189, 198 (1971) (if the Government chooses to provide for appeals, an impecunious defendant in a petty offense prosecution "cannot be denied a record of sufficient completeness to permit proper (appellate) consideration of his claims" (internal quotation marks omitted)); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 117-124 (1996) (state cannot use parent's inability to pay record preparation fees as grounds for denying an appeal in a proceeding that could result in permanent termination of her parental rights). Indeed, "[t]he fundamental requirment of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319 (1976) (quotation marks and citation omitted.)

Procedural due process does not protect litigants from any particular outcome; instead, it protects against an arbitrary denial of rights. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3rd Cir. 1989) *cert. denied*

sub nom Chicago Title Ins. Co. v. Tuscon unified School Dist., 493 U.S. 821 (1989). To that extent, "[a] decision maker must 'actually consider the evidence and argument that a party presents.' *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3rd Cir. 2001) (citation omitted.) Accordingly, the appellate body denies due process when it "act[s] as a mere rubber-stanp." *Id.* at 550 citing *Marincas v. Lewis*, 92 F.3d 195, 202 n.7 (3d Cir. 1996).

Essentially, the concept of due process of law requires fairness and justice in judicial proceedings and in determining whether such fairness and justice are present, the entire judicial process including review on appeal must be considered. *U.S. ex re. Marelia v. Burke*, 101 F.Supp. 615 (E.D.Pa. 1951) *aff'd* 197 F.2d 856 *cert. denied* 344 U.S. 868. Thus, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Anthony v. Interform Corp.*, 96 F.3d 692 (3rd Cir. 1996).

Turning to the case at bar, it is obvious that the Pennsylvania scheme of appellate review failed in this instance. The Superior Court's complete commentary on the merits consists of a single paragraph:

> After reviewing the parties' briefs, the record, and the relevant law, we conclude that the opinion authored by the Honorable Judge Carolyn E. Temin, adequately addresses and disposes of the issues raised on appeal. We, therefore, rely upon Judge Temin's opinion, a copy of which is attached for your review.

Importantly, the Superior Court's opinion does *not* indicate any basis for its conclusion. Rather, it acts as a mere rubber stamp of the Trial Court's decision. When coupled with

the Trial Court's refusal to entertain any argument regarding the liability of CSX and the Court's lip-service to its post-trial motion scope of review with respect to the evidence of Colanero's liability, it becomes obvious that the Petitioners' rights to due process of law have been eviscerated, as well as the Petitioners' fundamental First Amendment right to petition the government for the redress of grievances.

Finally, the failure of the Pennsylvania appellate courts to engage in meaningful appellate review occurs on a widespread basis. The Superior Court's internet site[7] contains poignant examples of the Court's use of unpublished memorandum decisions to dispose of its docket. An examination of the Court's own statistics reveals a vast disparity in the rate of reversal between those decisions in which an opinion has been published and those cases in which an unpublished memorandum opinion has been employed:

Superior Court Case Distribution Data
1989 - 2000

Year	Published	Reversed	%	Unpublished	Reversed	%
1989	729	204	27.9835	3665	360	9.82265
1990	743	210	28.2638	3451	393	11.38800
1991	700	235	33.5714	3499	428	12.23207
1992	715	241	33.7062	3698	480	12.97999
1993	692	234	33.8150	4387	578	13.17529

[7]The world wide web site for the Pennsylvania Superior Court webpage containing a link to its statistical data is located at http://www.superior.court.state.pa.us/about.htm.

1994	533	187	35.0844	4044	443	10.95450
1995	647	213	32.9211	4289	543	12.66029
1996	544	179	32.9044	4437	442	9.96169
1997	457	144	31.5098	4512	521	11.54699
1998	416	124	29.8076	4887	622	12.72764
1999	365	115	31.5068	5758	980	17.01980
2000	456	134	29.3859	4566	537	11.76084
Mean	583.0833	185	31.7050	4266.083333	527.25	12.18581

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that Your Honorable Court grant the instant petition and issue a Writ of Certiorari to the Pennsylvania Superior Court.

Respectfully submitted,

Frank D. Branella, Esquire

APPENDIX

APPENDIX
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Primo v. Colanero Contracting Co., No. 9206-1443 (Trial Court) A1

Primo v. Colanero Contracting Co., No. 2913 EDA 1999 (Appeal) A15

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April 25, 2001 Order denying reargument A22

A1

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA
TRIAL DIVISION - CIVIL SECTION

EDWARD PRIMO and DELORES PRIMO	:	FEBRUARY TERM, 1996
vs.	:	
COLANERO CONTRACTING CO., COLANERO EQUIPMENT CO., CSX TRANSPORTATION, INC. and the CITY OF PHILADELPHIA	:	CP 9602-1443

OPINION

TEMIN, J. DATE: September 3, 1999

Plaintiff sued as a result of injuries sustained in a work-related accident. This case was tried before this Court and a jury commencing on March 22, 1999. On March25, 1999 the Court granted a motion for directed verdict in favor of defendants CSX Transportation, Inc.("CSX") and the City of Philadelphia. A motion for directed verdict by Colanero Contracting Co. and Colanero Equipment Co.'s (Colanero) was denied. On March 30, 1999 the jury returned a verdict for the plaintiff husband against Colanero in the amount of $600,000 and in favor of the plaintiff wife against Colanero in the amount of $100,000. After trial, Colanero filed a timely motion for post-trial relief requesting judgment notwithstanding the verdict; or in the alternative, a new trial. Subsequently, plaintiff filed a "contingent" motion for a new trial requesting that CSX be included as defendant in the new trial

in the event that Colanero's motion is granted. Argument on the motions were heard on August 2, 1999. For the reasons stated below, this Court grants Colanero's motion for judgement n.o.v..

I. Judgment Notwithstanding the Verdict

In considering a motion for a judgment notwithstanding the verdict, the court must view the evidence in the light most favorable to the non-moving party. *Murray v. Philadelphia Asbestos Corp.*, 433 Pa. 206, 640 A.2d 446, 448 (1 994). Using this standard, judgment notwithstanding the verdict is proper when no two reasonable minds can fail to agree that the verdict was improper. 14. At trial, the plaintiff proved the following:

On the morning of April 24, 1995 plaintiff's employer, Guilietta Construction Co, ("Guilietta"), sent him and co-workers James Dadario III and "J.B." to pick up a trailer from a lot in Philadelphia and deliver it to it's New Jersey equipment site. The trailer was located on a lot that was owned by CSX and used by Guilietta.[8] The site used by Guilietta was adjacent to one of Colanero's equipment yards. The sites occupied by Guilietta and Colanero were located in an industrial area on Kingsessing Avenue between 68th and 69th Streets. Approximately half-way between 68th and 69th Streets, Kingsessing Avenue's paved surfaced ends. At that point, Kingsessing Avenue is an amorphous dirt road whose boundaries are difficult to distinguish from the dirt lots located on either side. The only reference point

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[8]There was no evidence that Guilietta had permission to do so and this Court found that Guilietta had the status of a trespasser. Although there was some mention during in camera discussion of a lease between Guilietta and CSX, this fact was never introduced in evidence at trial.

that could be used to determine where the street should have been was a utility pole near Guilietta's yard. It was uncontradicted that in pictures introduced at trial, the "street" was located to the right of the pole and the lot was located to the left. Parallel to CSX's property there was an embankment, at the bottom of which were railroad tracks owned by CSX. Other than having its' employees clear debris from the embankment and tracks once or twice a year, CSX did not enter the property.

On the morning of the accident, Guilietta's lot had one empty trailer and one loaded trailer parked upon it. The trailers were parked parallel to each other on a downward slope, separated by distance estimated at 2 to 5 feet.[9] The front of the trailers were lower than the rear but were otherwise squarely on the ground. Plaintiff testified that a section of concrete block had been placed by plaintiff's co-worker in front of the set of wheels on the loaded trailer that were closest to the empty trailer. This practice, known as "chocking", is used to prevent a detached trailer from moving while it is separated from a truck.[10] Plaintiff assumed that because the one wheel was properly chocked, that all other of the other wheels were properly chocked as well. As

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[9]Estimates as to the actual distance between the trailers varied. Plaintiff testified the distance was "[w]ide enough for someone to walk in the straightway without turning sideways." (N.T. 3/22/99, 79) Though the minimum clearances needed to operate to the landing gear were given, the actual distance was never offered. Plaintiff's expert stated that proper spacing between trailers is 2 to 4 feet or enough room to properly operate the landing gear. (N.T. 3-23-99, 361)

[10]Plaintiff's expert testified that the chocking of one axle is proper. (N.T. 3-23-99, 365)

a result, he did not take the time to inspect the wheels he could not see.

Contradictory testimony was presented regarding the condition of the soil on the day of the accident. At one point, plaintiff testified that the ground was lumpy and covered with red brick, asphalt and concrete. Plaintiff later testified that he did not sink into the ground while walking on it and that he did not notice any holes in the ground. Plaintiff's co-worker, John English, stated at deposition that the trailer's tires were not sunk into the ground on the date of the accident. For the purpose of this motion, this Court will assume that the ground was loose and full of debris.[11]

Plaintiff was ordered by James Dadario III, the son of the owner of Guilietta, to raise the empty trailer to allow a tractor to pull beneath it and link up. The trailer was equipped with a "landing gear" that, when cranked, would either extend or retract a pair of "legs" to aid in coupling or separation of a tractor. When extended, the landing gear provided enough clearance under the trailer to allow a tractor to either pull out from under it or back up underneath it. Once extended, the landing gear is then retracted and the trailer is either set in place on the tractor chasis or on the ground. The crank for the landing gear of the empty trailer was located on the side closest to the loaded trailer. As the plaintiff turned the crank to lower the landing gear, the loaded trailer tilted and fell towards the empty trailer pinning the plaintiff between the two trailers. As a result, the plaintiff was crushed and suffered extensive injuries to his chest, back, arms and legs.

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[11]The material on the ground is commonly referred to as "construction fill." Construction fill is composed of various types of material excavated from construction sites.

At trial, plaintiff introduced two experts, Samuel Sero (Sero), an expert on soil conditions and, Robert Nocivelli (Nocivelli), a truck and trailer expert. On or about March 19, 1997 Sero visited the accident site and found the lot surface of the lot was firm and compacted. He testified that there were several mounds of debris on the lot on that day. He opined that all of the mounds were created by machinery that pushed the loose debris that had been on the surface of the lot, including the accident area, into piles. He concluded that the removal of the loose material accounted for the compact surface on the day of his visit. Sero removed some loose soil from one of the mounds and performed compaction tests on the soil samples. Sero concluded that the soil Plaintiff testified that he was on Kingsessing Avenue between 68th and 69th Streets while working for another employer prior to working for Guilietta. (N.T. 3/22/99, 62) He observed Colanero' 5 employees on Guilietta' 5 lot cleaning their trucks and causing "a little bit" of debris to accumulate on the ground some distance from the accident scene. (N.T. 3/22/99, 103, 194) The common method for removing residue from the bed of a dump trucks requires the operator to fully raise the bed into the dumping position and release the lower catch on the tailgate. (N.T. 3-22-99, 64) The truck is then quickly driven forward and quickly stopped. (N.T. 3-22-99, 64) The abrupt stop causes the tailgate to slam into the bed and jar loose any debris that is stuck to the inside of the bed. (N.T. 3-22-99, 64) Because the bed is fully raised, any residue that is loosened falls to the ground under the released tailgate. (N.T. 3-22-99, 64)

and debris, of the type from the sample, could not be compacted enough to safely support a trailer. Sero assumed that the material he extracted from the mound in March 1997 was similar to the material on the ground on April 24, 1995. He concluded that the trailer tipped over because of the loose soil conditions.

Nocivelli never visited the accident but, instead, used Sero's conclusions and photographs an4 a survey of the lot taken approximately one year after the accident. He opined that it was improper to place a trailer on the site of the accident because the ground was too soft to support the weight of the trailer on the landing gear and the ground was not level. He stated that the slope of the lot and the condition of the soil allowed the landing gear to sink into the soil causing the loaded trailer to tilt toward the empty trailer.

Plaintiff claims that: Colanero was negligent in dumping and spreading dirt and debris over a lot where heavy machinery was regularly stored and maintained; Colanero's activities on the lot created the loose soil conditions, and, those conditions caused the trailer to shift and injure plaintiff~ Thus, plaintiff had to prove both that the soil conditions were a substantial cause of the accident and that Colanero was responsible for the soil conditions. Judgment notwithstanding the verdict may be granted if the plaintiff does not introduce prima facie evidence of both negligence and proximate cause. *Howell V. Clyde*, 533 Pa. 151, 156,620 A.2d 1107, 1109(1993).

Evidence presented at trial demonstrated that Colanero had permission to enter Guilietta's lot and that Colanero's equipment had, at times, been on parts of Guilietta's lot, but not where the accident occurred.[12] There is also evidence that Colanero's vehicles occasionally parked on the lot

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[12]Defendant testified that there were "occasions" when it's vehicles drove over some part of the lot. (N.T. 3-23-99, 543) It's equipment drove on the land "once a year, once every two years." (N.T. 3-24-99, 689)

for short periods of time when it's own yard was congested, but never overnight. Also, that Colanero used the lot to turn pieces of large equipment around when the equipment required an area wider than the "street" to make a turn.

Plaintiff testified that six or seven months prior to the accident, two of Colanero's dump trucks were cleaning out residue left in the beds of their trucks on Guilietta' 5 lot. Plaintiff saw Colanero's employees performing a maneuver commonly used by dump truck drivers to dislodge any remains of a load that may have stuck to the insides of the dump body.[13] The area was a common site for illegal dumping by others as well. When the illegally dumped material blocked the entrance to Colanero's yard, Colanero pushed the debris out of the way with its' machinery to restore access.

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[13]Plaintiff testified that he was on Kingsessing Avenue between 68th and 69th Streets while working for another employer prior to working for Guilietta. (N.T. 3/22/99, 62) He observed Colanero' 5 employees on Guilietta' 5 lot cleaning their trucks and causing "a little bit" of debris to accumulate on the ground some distance from the accident scene. (N.T. 3/22/99, 103, 194) The common method for removing residue from the bed of a dump trucks requires the operator to fully raise the bed into the dumping position and release the lower catch on the tailgate. (N.T. 3-22-99, 64) The truck is then quickly driven forward and quickly stopped.(N.T. 3-22-99, 64) The abrupt stop causes the tailgate to slam into the bed and jar loose any debris that is stuck to the inside of the bed. (N.T. 3-22-99, 64) Because the bed is fully raised, any residue that is loosened falls to the ground under the released tailgate. (N.T. 3-22-99, 64)

Plaintiff failed to prove that the soil conditions caused the accident. The only evidence that soil conditions caused the accident was Sero's testimony. Sero had not been to the accident site until March of 1997 at which time he took samples for testing. Sero's opinion assumes that the soil taken in March 1997 was similar to the soil on the day of the accident in April 1995. No facts were proven which support Sero's conclusion that the testing sample is representative of the soil in 1995. Sero speculated that the composition of the sample was similar to the material on
the lot on the day of the accident. Such speculation can not form the basis of an expert opinion. *Hussey v. May Department Stores Inc.*, 283 Pa. Super. 431, 436, 357 A.2d 635, 637 (1976). Sero's testimony was improperly admitted. Without Sero's testimony, there is no causal connection established between Colanero and the accident.

Plaintiff has failed to prove that Colanero was responsible for the soil conditions. Even if the opinion of the plaintiffs soil expert is accepted as true, plaintiff has failed to establish a causal connection between the condition of the soil at the accident site on the day of the accident and any activity by Colanero. Plaintiff introduced evidence that Colanero drove equipment upon some area of the parcel where the accident occurred, but not on the date of the accident. Additionally, evidence showed that Colanero bulldozed dirt and debris left by others and, at one point six or seven months before the accident, dropped a negligible amount of debris on the lot. Plaintiff's evidence of Colanero's responsibility for the soil conditions was limited to testimony that Colanero had been on Guilietta's lot in the past, Colanero excavated dirt and debris from construction sites in the course of its' business, Colanero had the equipment to spread the dirt and debris and that dirt and debris was on Guilietta's lot.

Though material removed from construction sites can vary depending on the particular job site from which it is removed, the material at the accident site had some similarities to the type of material that has been excavated by Colanero as part of it's business. However, Stephen Colanero, the owner of Colanero, noted differences between the debris in the trial photographs and the debris that is common on Colanero's job sites. Mr. Colanero also noted that with rare exceptions, his company's material is taken directly to recycling centers and not to any of its' equipment yards. Plaintiff has not produced evidence that Colanero was the source of the soil on Guilietta's lot or that Colanero altered the terrain of the lot other than unblocking the entrances to its' site.

For the reasons discussed above, this court grants the defendant's motion for judgement notwithstanding the verdict.

II. Motion for a New Trial

Defendant alternatively seeks a new trial. The granting of judgement n.o.v. renders this issue is moot. However, in the interest of judicial economy, it will be addressed. In addition to the issues discussed above, Colanero claims that: the trial court erred in permitting Sero to testified as an expert; defendant's cross-examination of the plaintiff was improperly limited; plaintiff's attorney made improper and prejudicial remarks during trial; and the verdict was the product of jury confusion. These issues are addressed seriatim below:

Denial of Defendant's Motion in Limine to Exclude Sero's Testimony

Colanero filed a motion in limine claiming that Sero's testimony should have been excluded on the grounds that he was

not properly qualified to testified as an expert on soil conditions. The Trial Court has wide discretion in assessing the qualification of experts and the admission of expert testimony. *Miller v. Brass Rail Tavern Inc.*, 541 Pa. 474, 664 A.2d 525 (1995). Pennsylvania Rule of Evidence 702 states the basis on which an expert may be qualified:

> "if scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testily thereto in the form of an opinion or otherwise.

Mr. Sero was properly qualified to offer an expert opinion on soil conditions. The liberal standard for expert qualification in Pennsylvania is well-settled. *Miller*, 541 Pa. at 480-81, 664 A.2d at 528. The test to be applied when qualifying an expert is whether the witness has any reasonable pretension to specialized knowledge on the subject matter under investigation (emphasis in original). *Id.*. Mr. Sero's work experience and patents demonstrate the requisite qualification for presenting expert testimony on load bearing capabilities of soil. The motion in limine was properly denied.[14]

Cross-Examination of Plaintiff

Colanero maintains that several statements made by

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[14]Colanero's claim that Sero's testimony was inadmissable because it was merely speculative is discussed, supra, at page 7.

plaintiff regarding his living conditions after the accident rendered the collateral source rule inoperative, thus creating the opportunity for cross-examination on the receipt of worker's compensation. *Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 188 A.2d 259 (1963). Colanero argues that the court improperly limited the scope of cross-examination by not permitting this inquiry.

Plaintiff testified that he was forced to borrow money and live in his brothers basement after the accident. Colanero contends both that this testimony opened the door to questioning on the receipt of worker's compensation and to the plaintiffs credibility. Though plaintiff testified as to his lifestyle after the accident, he neither stated that he had not received any support or that any medical bills were left unpaid. The mere fact that plaintiff described his living conditions does not amount to an inference that he did not receive worker's compensation. *See Gigliotti v. Machuca,* 409 Pa. Super 50, 597 A.2d 655 (1991). The Court properly refused to allow defendant to conduct cross-examination on the issue of the receipt of worker's compensation.

Improper and Prejudicial Remarks by Plaintiff's Attorney

Colanero asserts that plaintiff's attorney, Mr. Frank D. Branella, Esquire, made numerous remarks directed at the jury concerning evidence and issues that had been ruled inadmissable and made improper appeals to the prejudices and sympathies of the jury Colanero points to several instances where Mr. Branella posed misleading and irrelevant questions, made nonverbal communication with the jurors, ignored prior court rulings and argued facts not in evidence. In addition, Colanero cited several instances of appealing to

the juror's sympathies.

It is true that at times, Mr. Branella's behavior was improper and worthy of reprimand. However, any possible taint from Mr. Branella's statements or gestures was cured by this Court's prompt and thorough cautionary instructions to the jury. Th addition, much of his questionable conduct occurred outside the presence of the jury. In the recent case of *Commonwealth v. Rico,* ___ Pa ___ ,711 A.2d 990 (1998) the Superior Court of Pennsylvania affirmed this Court's refusal to grant a new trial based on the arguably outrageous conduct of the prosecutor. In *Rico,* immediate and lengthy cautionary instructions given by this Court to the jury were found to be curative of misconduct far more egregious than that of Mr. Branella. Defendant is not entitled to relief on this ground.

The Verdict was the Product of Jury Confusion

Defendant cites the disregard for the instruction on the verdict sheet as evidence of jury contusion.[15] During the jury charge, the Court instructed the jury on the proper use of the verdict sheet. During the charge the Court explained Question 4:

> ". . . we are going to go to the next question which reads: Was the negligence of plaintiff Edward Primo a substantial factor in causing the harm suffered by the plaintiff, Edward Primo? If your answer is yes, go to the next question (# 5). If your answer is no, the you go to Question Number 6. But for the sake of going over the verdict sheet, we will got to the next question. If you get to question number 5, it means you have found both the defendant and plaintiff were negligent, and in each case the negligence was a substantial factor in causing the harm to the plaintiff (N.T. 3-30-99, 1126)

Contrary to the instructions, the jury answered question 5 even though they answered "no" to question 4. When questioned about the deviation from the instructions, the foreperson indicated that "some of us thought he (Primo) was just a little bit negligent and we thought we should say so." (N.T. 3-30-99, 1138) At the request of a "couple" of jurors, the foreperson indicated on question 5 that plaintiff was 4% negligent. (N.T. 3-30-99, 1133-35) Regardless, none

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[15]Colanero also claims that questions asked by the jury during deliberations indicate jury confusion. This Court did not find the questions unusual. This claim does not merit discussion.

of the jurors found that his negligence was a substantial factor in bringing about his harm. When polled in open court, all 12 jurors agreed with the verdict. The assertion of jury confusion is not supported by the record. *Commonwealth v Tressler*, 526 Pa. 139, 14546, 584 A.2d 930, 933 (1990). There is no reason to grant a new trial on this ground.

III. Plaintiff's Motion Requesting the Inclusion of CSX in the Event of a New Trial

Plaintiff's motion is meritless and not worthy of discussion. There is no evidence from which a jury could find that CSX was responsible for plaintiff's injuries. The motion is denied.

For the reasons stated above, defendant Colanero's motion for judgement n.o.v. is granted. Plaintiff's motion is denied.

EDWARD PRIMO AND DELORES PRIMO, H/W Appellants	: IN THE SUPERIOR : COURT OF PENNSYL- : VANIA
VS	:
CITY OF PHILADELPHIA, COLANERO CONTRACTING CO., COLANERA EQUIPMENT CO., AND CSX TRANSPORTATION, INC., Appellees	: No.2913 EDA 1999

Appeal from the Order entered September 7, 1999
In the Court of Common Pleas of Philadelphia
County, Civil No.1443 February Term, 1996

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EDWARD PRIMO AND DELORES PRIMO, H/W Appellees	: IN THE SUPERIOR : COURT OF PENNSYL- : VANIA
VS	:
COLANERO CONTRACTING CO., COLANERA EQUIPMENT CO., Appellants	:
AND	:
CSX TRANSPORTATION,	:

INC., AND CITY OF :
PHILADELPHIA :
Appellees : No.3215 EDA 1999

Appeal from the Judgment entered September 23, 1999
In the Court of Common Pleas of Philadelphia County,
Civil No.1443 February Term, 1996

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BEFORE: CAVANAUGH, BECK, JJ.. and CIRILLO, P.J.E.

MEMORANDUM: FILED Mar. 21, 2000

Edward T. Primo and Delores Primo appeal from the order of the Court of Common Pleas of Philadelphia County granting the motion of Colanero Contracting Company and Colanero Equipment Company's (collectively referred to as Colanero) motion for Judgment Notwithstanding the Verdict (j.n.o.v.), and granting CSX Transportation, Inc.'s (CSX) and the City of Philadelphia's motions for a directed verdict. We affirm.

Edward T. Primo filed complaints against Colanero, CSX, and the City of Philadelphia after he suffered injuries to the left shoulder, when a trailer, adjacent to the trailer on which he was working, fell over and crushed him. The incident occurred on a section of land which is owned by appellee, CSX and is adjacent to Kingsessing Avenue between 68th and 69th Streets, in Philadelphia. The section of land is also adjacent to property owned by the appellee, Colanero.

On March 22, 1999, the case was tried before a jury in the Court of Common Pleas of Philadelphia. On March 25,

1999, the court granted a motion for directed verdict in favor of CSX and the City of Philadelphia. A motion for directed verdict by Colanero was denied. On March 30, 1999, a jury returned a verdict in favor of Edward Primo and against Colanero in the amount of $600,000.00. The jury also returned a verdict for Delores Primo and against Colanero in the amount of $100,000.00 for loss of consortium.

Colanero then filed a post-trial motion requesting j.n.o.v. or alternatively, a new trial. Mr. and Mrs. Primo subsequently filed a post-trial motion against CSX, alleging that the court erred in granting CSX's motion for directed verdict. After oral argument, the trial court denied Mr. and Mrs. Primo's post-trial motion against CSX and granted j.n.o.v. in favor of Colanero.[16]

Mr. and Mrs. Primo raise the following questions for our review:

> 1. Was the evidence which was presented at trial sufficient to support the jury's verdict in favor of the Plaintiffs and against the Defendants, Colanero Contracting Company and Colanero Equipment Company, with regard to the issue of causation?
>
> 2. Did the Trial Court err in holding that the Defendant, CSX Transportation, Inc., did not owe a duty to discover the dangerous condition of its real

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[16]Colanero alternatively sought a new trial. The Honorable Judge Temin determined that the granting of j.n.o.v. rendered the issue moot.

estate or warn the Appellant, Edward T. Primo, of the dangerous condition?

After reviewing the parties' briefs, the record, and the relevant law, we conclude that the opinion authored by the Honorable Judge Carolyn E. Temin, adequately addresses and disposes of the issues raised on appeal. We, therefore, rely upon Judge Temin's opinion, a copy of which is attached for your review.

Judgment affirmed.

EDWARD PRIMO AND DELORES PRIMO, H/W Appellants	: IN THE SUPERIOR : COURT OF PENNSYL- : VANIA
VS	:
CITY OF PHILADELPHIA, COLANERO CONTRACTING CO., COLANERO EQUIPMENT CO., AND CSX TRANSPORTATION, INC., Appellees	: : : : No.2913 EDA 1999

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

EDWARD PRIMO AND DELORES PRIMO, H/W Appellants	: IN THE SUPERIOR : COURT OF PENNSYL- : VANIA
VS	:
CITY OF PHILADELPHIA, COLANERO CONTRACTING CO., COLANERO EQUIPMENT CO., AND CSX TRANSPORTATION, INC., Appellees	: No.2913 EDA 1999

ORDER

AND NOW, this 31st day of May, 2000, IT IS HEREBY ORDERED:

THAT the application filed April 4, 2000, requesting reargument/reconsideration of the decision dated March 21, 2000 is DENIED.

PER CURIUM

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

EDWARD PRIMO AND DELORES PRIMO, H/W Petitioners	: No. 399 E.D. Allocatur : Docket 2000
VS	:
CITY OF PHILADELPHIA, COLANERO CONTRACTING CO., COLANERO EQUIPMENT CO., AND CSX TRANSPORTATION, INC., Respondents	: Petition for Allowance of Appeal from the Superior Court

ORDER

PER CURIUM:

AND NOW, this 13th day of March, 2001, the Petition for Allowance of Appeal is hereby DENIED.

Attest: March 14, 2001

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

EDWARD PRIMO AND DELORES PRIMO, H/W Petitioners	: No. 399 E.D. Allocatur : Docket 2000 :
VS	:
CITY OF PHILADELPHIA, COLANERO CONTRACTING CO., COLANERO EQUIPMENT CO., AND CSX TRANSPORTATION, INC., Respondents	: Petition for Allowance : of Appeal from the : Superior Court :

ORDER

PER CURIUM:

AND NOW, this 25th day of April, 2001, the Petition for Allowance of Appeal is hereby DENIED.

Attest: April 25, 2001